Supreme Court, U.S.
FILED

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No. 98 -

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Dirk S. Nye, *Petitioner*

v.

Securities and Exchange Commission,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner
Dirk S. Nye

QUESTIONS PRESENTED

1. In an enforcement proceeding, does the Securities & Exchange Commission's promise of dismissal to one respondent in exchange for incriminating testimony against another party, threat of reinstitution of proceedings against that respondent if specific required testimony is not given, and refusal to make disclosure and public record of *ex parte* communication with the settling respondent surrounding the promise and the threat, fatally taint the testimony of the settling respondent and comprise the adjudicatory integrity of the Commission?

2. Where *ex parte* communications between the Securities & Exchange Commission and a settling respondent procure specific new testimony that incriminates a non-settling respondent, is the failure to make disclosure and public record a violation of the safeguards of the Fourteenth Amendment of the United States Constitution; Administrative Act 5 U.S.C. Section 557(d) and SEC Rule of Practice 17 C.F.R. Section 200.111?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Shaw Sullivan

Dirk S. Nye

Stuart Graff

C. James Padgett

Securities & Exchange Commission

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No. 98 -

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Dirk S. Nye,
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v.

Securities and Exchange Commission,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dirk S. Nye respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit issued its unreported Order denying Appellant Dirk S. Nye's Petition For Rehearing and Suggestion for Rehearing *in Banc* on August 4, 1998. Appendix A. The United States Circuit Court of Appeals for the District of Columbia issued its unreported judgement denying Petitioner Nye's Petition for Review on May 27, 1998. Appendix A.

JURISDICTION

The Court of Appeals entered its Judgement on May 27, 1998, and entered its Order denying Appellant Nye's Petition for Rehearing and Suggestion for Rehearing *in Banc* on August 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

This case involves the Due Process guarantee of the Fourteenth Amendment to the United States Constitution,) the United States Administrative Procedure Act, and the Securities & Exchange Commission Rules of Practice.

The Fourteenth Amendment provides:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C.§ 557(d) of the Administrative Procedures Act expressly prohibits *ex parte* communications with the agency and requires that such communications be placed on the public record. (Pertinent text is set forth in Appendix A)

17 C.F.R.§ 200.111 is a rule of the Securities Exchange Commission that expressly prohibits *ex parte* communications with the Commission concerning an administrative proceeding after the institution of the proceeding. (Pertinent text is set forth in Appendix A)

STATEMENT OF THE CASE

On April 5, 1989, the Securities & Exchange Commission instituted proceedings against Dirk S. Nye and other respondents which included Thomas Meinders. Division of Enforcement, and the Agency staff through the Division of Enforcement, had *ex parte* meetings, phone conversations and other forms of communication with Meinders and his attorney on matters of settlement which included the specific testimony the Division required Meinders to recount in order to have the proceedings against him dismissed. In response to a letter from Counsel for the Division of Enforcement, Robert S. Fusfeld, written on behalf of the Division and the Agency staff, Meinders tendered a proffer to the Division of Enforcement on March 23,

1990. The proffer contained a written accounting of specific testimony to which Meinders would testify in exchange for the SEC dismissing the charges against him. On March 27, 1990, in response to a March 26, 1990, phone call from the Division, Meinders executed a supplemental proffer containing additional information to which the Division required him to testify. The statements of fact in the proffer and supplemental proffer reversed Meinders' prior sworn statement and inculpated co-respondent Nye. The Commission met secretly during the course of the proceedings, reviewed and approved the proffer at an *ex parte* meeting. A settlement agreement was entered with Meinders on April 5, 1990, and on April 20, 1990, the SEC dismissed the proceeding against Meinders on the condition that he testify in substantial conformity with his proffer. The settlement agreement specified that the proceedings could be reinstituted should Meinders violate any of the undertakings contained in the agreement.

Nye moved to exclude Meinders' testimony, dismiss the proceedings, disqualify the commissioners, and to require production of records of the *ex parte* communications. The SEC refused to make disclosure and public record of the communications surrounding the procurement of Meinders' new testimony and denied Nye's motion.

After the dismissal of the proceedings against him, Meinders testified in conformity with his proffer. The SEC relied on Meinders' new testimony in its finding that Nye had failed to supervise.

The subject-matter jurisdiction of the SEC in this instance is found in Section 15(b)(4)(E) of the Securities Exchange Act of 1934. Jurisdiction of the United States Court of Appeals to review decisions of the SEC is found in Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a).

This Petition for Writ of Certiorari is taken from the decision of the United States Court of Appeals For the District of Columbia Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is erroneous. It has sanctioned a departure by the Securities & Exchange Commission that is so far from the requirements of due process that it calls for an exercise of this Court's supervisory power. It has decided an important federal question in a way that conflicts with the due process guarantee of the Fourteenth Amendment of the United States Constitution, decisions of its own circuit, the Administrative Procedures Act and the Rules of Practice of the Securities & Exchange Commission

It is a fundamental principal of administrative law that respondents are entitled to due process, which includes the right to an impartial decision maker. See *Amos Treat & Co. V. SEC*, 306 F.2d 260, 263-64 (D.C.Cir. 1962). The test for disqualification has been succinctly stated as being whether:

> a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.

Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (brackets in original), quoting *Gilligan, Will & Co. SEC*, 267 F.2d 461, 469 (2 Cir.), *Cert. denied*, 361 U.S. 896 (1959).

In this instance, the role of the Commission as an impartial decision maker has been fatally compromised.

The Division of Enforcement while in contact with the Commission staff: assisted in the preparation of Meinders' proffer, which opposed his prior sworn statement; required specific testimony that incriminated Nye; offered dismissal of the proceedings for testimony; and, required that such testimony be given under threat of reinstitution of the proceedings.

Criminal cases have historically held that compelling specific testimony of a witness under threat requires reversal. For example, in *People v. Green* 228 P.2d 867, 871 - 72 (1951), judgement was reversed when a party jointly charged was granted immunity if he:

> ...gave testimony that would satisfy the committing magistrate that Green would be bound over for trial; otherwise he would stand trial with Green, and in view of the testimony he was about to give, would

> surely have been convicted. It is not a question whether his first testimony was true or false, nor is it to be suspected that testimony was used which was known to the State to be false.....A miscarriage of justice was occasioned through the use by the State of testimony which, because of the condition upon which immunity depended, was impure, dubious and "tainted beyond redemption."

Rex v. Robinson, 30 B.C. 369, 70 D.L.R. 755 reversed when a witness was given to understand that in considering a recommendation for a pardon,

> ....it would be expected that his testimony at the trial would be in conformity with the statements he had made to the police....his testimony was tainted beyond redemption and could not, in a legal sense, be weighed by the jury, because the witness was no longer a free agent and there was no standard by which his veracity could be tested or estimated.

As far back as the *Tonge's Case*, 6 How.St.Tr., p. 227, 1662 it was decided that even in cases of treason, threats should not be used to procure testimony from accomplices.

The SEC action of compelling the proffered testimony by threat of reinstitution against the witness,

should itself warrant reversal.

The SEC actions went much further. The SEC made *ex parte* communications with Meinders and his attorney, who were interested third parties outside the agency, relative to the merits of the proceeding. The Division of Enforcement presented such communications to the Commission. The Commission staff was included in the discussions regarding the substance of the testimony to be included in the Meinders' proffer and the Division's settlement negotiations. The proffer did not require Meinders to tell the truth. The very nature of the proffer, requiring specific testimony adverse to Nye, taints whatever communications the Division had with the Commission regarding acceptance of the Meinders' settlement. The proffer as written, affected the decisional process specific to Nye. The subsequent testimony of Meinders in conformity with the proffer was heavily relied upon in the SEC decision. The inculpating power of the proffer is apparent on its face. (Appendix A)

Administrative Procedure Act 5 U.S.C. 557(d) requires that a public record be created containing the communication and other memoranda surrounding such *ex parte* communication. Commission Rule of Practice 17 C.F.R. 200.111 prohibits such *ex parte* communications. The SEC permitted the communications and refused to make disclosure and create a public record.

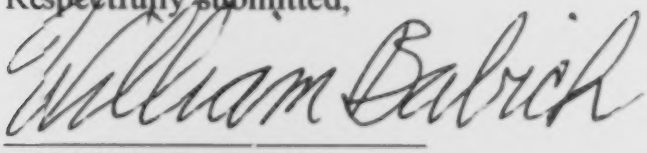
The proper sanction for these violations is dismissal of the proceedings. *Professional Air Traffic Controllers Org. v. FLRA*, 672 F.2d 109, 113 (D.C. Cir 1982). This Court has only the unsupported statement of the SEC that improprieties did not occur surrounding the Meinders' settlement. When, as in this instance, the Agency justifies its actions and at the same time refuses to disclose such relevant information, "a reviewing court cannot presume that the agency has acted properly," *U.S. Lines, v. Federal Maritime Commission* 584 F.2d 519, 541, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra* 401 U.S. at 415, 419-420, "but must treat the agency's justifications as a fictional account of the actual decision making process and must perforce find its actions arbitrary." *U.S. Lines* citing *Rupert v. Washington*, 366 F.Supp. 686,690 (D.D.C. 1973). The Court is called upon to test the SEC actions against the full administrative record that was before the SEC at the time it made its decision. *U.S. Lines* citing, *Overton Park*, *supra*, 401 U.S. 420, 91 S.Ct. at 825. The Court in this instance, failed to enforce the protections afforded by law.

The Circuit Court decision permits: the Commission to procure testimony tainted beyond redemption; to compromise its adjudicatory integrity with impunity; and to violate the safeguards accorded a respondent under the Fourteenth Amendment of the United States Constitution, the Administrative Procedures Act and the SEC's own Rules of Practice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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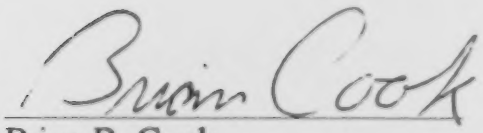

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1361 **September Term, 1997**

UNITED STATES COURT OF
APPEALS FOR DISTRICT
OF COLUMBIA CIRCUIT
FILED
May 27 1998
CLERK

Shaw Sullivan,
Petitioner

v.§

Securities and Exchange Commission,
Respondent

Consolidated with 97-1366, 97-1367

On Petitions for Review of an Order of the
Securities and Exchange Commission

Before: Wald, Silberman, and Garland,
Circuit Judges.

JUDGMENT

These petitions for review were considered on the record from an order of the Securities and Exchange Commission ("SEC") and on the briefs and arguments

of counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See* D.C. Cir. Rule 36(b). Because the court finds that substantial evidence supported the SEC's factual findings, *see* 15 U.S.C. § 78y(a)(4), and that the SEC's legal conclusions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *see* 5 U.S.C. § 706(2)(A), it is

ORDERED AND ADJUDGED that the petitions to review the order of the Securities and Exchange Commission dated March 20, 1997, be denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: "S/Eva Brown"
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 97-1361 **September Term, 1997**

UNITED STATES COURT OF
APPEALS FOR DISTRICT
OF COLUMBIA CIRCUIT
FILED
AUG 4 1998
CLERK

Shaw Sullivan,
Petitioner

v.

Securities and Exchange Commission,
Respondent

Consolidated with 97-1366, 97-1367

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the Suggestion for Rehearing In Banc of petitioner Nye, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: "S/Robert A. Bonner"
Robert A. Bonner
Deputy Clerk

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 27927 / April 20, 1990

Administrative Proceeding
File No. 3-7164

In the Matter of

Thomas R. Meinders,
The Stuart-James Co., Inc.,
et. al.

Order Dismissing
Proceedings

The proceedings against Thomas R. Meinders ("Meinders") were instituted pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act")1/ Meinders has tendered an Offer of Settlement ("Offer") dated April 5, 1990, in which he has voluntarily undertaken that he: 1) will not associate with any broker-dealer except in a supervised, non-supervisory capacity for three years from the date of this order; 2) if associated with a broker-dealer both he and his employer will certify by affidavit to the staff of the Denver Regional Office within thirty days of entry of this Order (or within thirty days of any change of employment affiliation by him) and thereafter on the anniversary date of this Order that he is associated in a supervised, non-supervisory, capacity, and is properly supervised and 3) will testify in this proceeding as a witness in substantial conformity with his proffer

tendered with his offer of settlement. Based on the undertakings contained in the Offer, these proceedings against Meinders are hereby dismissed, provided that they may be reinstituted should Meinders violate any of the undertakings contained in the Offer. Each party is to bear its own attorneys fees and costs of litigation.

By the Commission,

"S/Jonathan G. Katz"
Jonathan G. Katz
Secretary

1/ These proceedings were instituted on April 5, 1989 against Meinders and eleven other respondents.

STATUTES

5 U.S.C. § 557(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law-

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

17 C.F.R. § 200.111(a) *Prohibited communications.* In any agency proceeding which is subject to this subpart, except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the agency shall make or knowingly cause to be made to any member of the Commission or decisional employee an ex parte communication relevant to the merits of the proceeding; and

(2) No member of the Commission or decisional employee shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding.

(b) *Proceedings to which prohibitions apply.* This subpart shall apply to all proceedings subject to 5 U.S.C. 557(a), including suspension proceedings instituted pursuant to the provisions of Regulations A, B, E, and F of the Securities Act of 1933 (§ 230.251 *et seq.* of this chapter), all review proceedings instituted pursuant to section 19(g) of the Securities Exchange Act of 1934, and all other proceedings where an evidentiary hearing has been ordered pursuant to a statutory provision or rule of the Commission and where the action of the Commission must be taken on the basis of an evidentiary record. In addition, this subpart shall apply to any other proceeding in which the Commission so orders.

(c) *Period during which prohibitions apply.* (1) The prohibitions in § 200.111(a) shall begin to apply when the Commission issues an order for hearing; *Provided,*.....

(iii) In no case shall the prohibitions in § 200.111(a) begin to apply later than the time at which

a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

(2) The prohibitions in § 200.111(a) shall continue until the time to file a petition for rehearing from the final order of the Commission has expired. In the event a petition for rehearing is filed, these prohibitions shall cease if and when the petition for rehearing is denied.

(3) The Commission may, by specific order entered in a particular proceeding, determine that these prohibitions shall commence from some date earlier than the time specified in this paragraph (c) or shall continue until a date subsequent to the time specified herein.

(d) *Definitions*. As used in this subpart:

(1) *Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all participants to the proceeding is not given, but it shall not include requests for status reports on any matter or proceeding. In addition, and ex parte communication shall not include:

(i) any written communication of which copies are served by the communicator contemporaneously with the transmittal of the communication in accordance with requirements of Rule 150 of the Commission's Rules of Practice, § 201.150 of this chapter, upon all participants to the proceeding (including the interested Division or Office of the Commission); or

(ii) Any oral communications where 48 hours advance written notice is given to all participants to the

proceeding (including the interested division of the Commission).

(2) *Participants to the proceeding* means all parties to the proceeding (including the interested Division or Office of the Commission) and any other persons who have been granted limited participation pursuant to the provisions of Rule 210(c) of the Commission's Rules of Practice, § 201.210(c) of this chapter.

(3) *Decisional employee* means: (i) The administrative law judge assigned to the proceeding in question; and

(ii) All members of the staff of the Office of Opinions and Review; and

(iii) The legal and executive assistants to members of the Commission; and

(iv) Any employee of the Commission who has been specifically named by order of the administrative law judge or the Commission in the proceeding to assist thereafter in making or recommending a particular decision; and

(v) Any other employee of the Commission who is, or may reasonably be expected to be, involved in the decisional process of the proceeding.

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March 23, 1990

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410 Seventeenth Street, Suite 700
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RE: In the Matter of the Stuart-James Co., Inc. et al. (Admin. Proc. 3-7164)
Proffer of Testimony of Thomas Meinders

Dear Mr. Fusfeld:

This proffer of testimony of Thomas Meinders ("Meinders") is submitted pursuant to your March 23, 1990 letter to me. Please be advised that if settlement of the charges against Meinders is reached, Meinders would testify substantially as follows:

1. During the January 1987-August 1987 period that he served as branch manager for the Colorado Springs, Colorado branch office of the Stuart-James Co., Inc. ("Stuart-James") brokers in that office were advised

to cross sales transactions, i.e., to find a purchaser to match customer sale orders.

2. Brokers in the Colorado Springs office were advised to cross transactions by Meinders and assistant managers in that branch office.

3. For much of this period of time the term "crossing" was used. The term "no net selling" to his knowledge was first used at a meeting of Stuart-James management subsequent to a general brokers' meeting which took place at the Hyatt Regency hotel located in the Denver Tech Center in or about spring or summer 1987. Those present at this meeting were Stuart Graff, Ivan Lustig, Dirk Nye, John Sutton, Mike Barber, Jim Zenhari, Bob Gibbs, Brian McCauly and others whom he does not recall. At this meeting, Mr. Graff stated that managers should find a reason to fire brokers who were net sellers on a continual basis. Previously, Mr. Graff had told the general broker meeting audience that there were to be no sell tickets submitted unless there were purchase tickets submitted as well.

4. Throughout the period that he was branch manager of the Colorado Springs office, he received instructions both from John Sutton and Dirk Nye that the office was not to engage in any selling transactions for customers that were not crossed. Both Mr. Sutton and Mr. Nye became angry when transactions were not crossed in the branch office.

5. Meinders instructed brokers who had sell orders not covered by buy orders to delay submitting sell orders (sometimes until the following morning) in

order that there would then be more time to seek a retail buy order. In this regard, there was a board on the wall at the office at the time that he became branch manager and continuing during the period that he was branch manager upon which was posted available sell positions so that all brokers in the office could participate in finding buy orders for those positions. This posting was done in all of the offices in the western region that he had visited and was known to Stuart-James management.

6. It was clear to Meinders that Stuart-James did not want customer sale orders that were not crossed because any uncovered sale order would then have to be bought into inventory of Stuart-James and this could put Stuart-James at risk and also have the effect of deflating the market price for the stock. The crossing and no net selling was also termed a "riskless transaction."

7. Generally, the brokers in the office would attempt to cross and were so instructed, unless there was notice from Dirk Nye that he was looking to buy stock away from the branch office.

8. The crossing/no net selling situation affected Meinders on transactions in his own personal securities account after he resigned as manager but continued with Stuart-James as a broker. In September 1987 he wrote tickets for the sale for securities from his account for a gross price of approximately $27,000. He wanted to sell to get funds for the purchase of property. He submitted the sell tickets to the successor branch manager, Robert Frye who told him not to enter those tickets. He then called Dirk Nye who told him that he should not run

those tickets. He then called Jim Padgett, explained his situation to Mr. Padgett who told him to run the tickets, and if there were any problems to call Mr. Padgett. The sell orders were entered.

9. On each new issue, Dirk Nye would call Meinders to ask how many shares of the new issue brokers in the branch office would be buying for customers in the after market at price levels specified by Mr. Nye. At the instructions of Mr. Nye, Meinders previously told the brokers in the office to call their customers to get indications of interest for after market purchases at specific prices. He would report back to Mr. Nye the information obtained by the brokers in the office. The purpose of this procedure was to have purchasers available to buy new issue selling customers' positions. By so doing, Stuart-James was minimizing the risk that it would have to purchase back into inventory customer positions.

Very truly yours,

"S/A. Thomas Tenenbaum"
A. Thomas Tenenbaum
For the Firm

"S/Edmund L. Epstein"
Edmund L. Epstein
Of Counsel

ATTORNEYS FOR THOMAS MEINDERS

I have read the foregoing Proffer. Said Proffer is

true and correct. I hereby authorize Brenman Raskin Friedlob & Tenebaum to submit said Proffer on my behalf.

"S/Thomas Meinders"
Thomas Meinders

kdo/fufa23.ltr

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March 27, 1990

Hand Delivered
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Denver, Colorado 80202

RE: In the Matter of the Stuart-James Co., Inc. et al. (Admin. Proc. 3-7164
Proffer of Testimony of Thomas Meinders

Dear Mr. Fusfeld:

This proffer of testimony of Thomas Meinders ("Meinders") is submitted pursuant to your March 23, 1990 letter to me. This proffer is a supplement to the proffer previously submitted March 23, 1990. The information contained herein is in response to your request for same made in our telephone conversation March 26, 1990. Please be advised that if settlement of the charges against Mr. Meinders is reached, Meinders would testify substantially as follows:

1. Meinders first became associated with Stuart-James Co., Inc. ("Stuart-James") in or about March 1984. The first public offering underwritten by Stuart-James after Meinders joined the firm was for a company called MicroEnergy, Inc. Meinders was manager of the Greeley, Colorado office. That office was net buying the common stock of MicroEnergy, Inc. in the after market. Customers of the Greeley office had positions in MicroEnergy when the price of that stock declined substantially. Clients of the Greeley office lost money. At a dinner for Linda Nye's 40th birthday held at the Oxford Hotel restaurant in December 1984, Jim Padgett and Dirk Nye criticized Meinders for the Greeley office being a net buyer of MicroEnergy, Inc.. Padgett advised Meinders to not have customers hold stock positions for long, to take customers out of the stock and put new customers into the stock so that the customers, the branch office and Meinders could make money. After this occasion, Dirk Nye began calling Meinders on a frequent basis (two to three times per day). Prior thereto, Nye rarely called Meinders. The purpose of Nye's calls were to find out the stock positions of customers of the Greeley office. The message that Meinders got from this meeting was that the Greeley office should start crossing sell and buy orders. Meinders was made aware after the MicroEnergy offering that other Stuart-James offices were doing a large volume of transactions of the first day of trading of the public offerings from information received from corporate headquarters showing this.

2. Prior to Stuart-James adopting the management organization of regional managers, branch managers were under the direct oversight of Mr. Graf.

Prior to the first day of trading in public offerings, Graf would call Meinders to find out the results of broker solicitations of after-market purchase indications by customers. This was for the purpose of lining up purchase orders for the after-market in the first day of trading to enable the crossing of sale and purchase transactions. After the implementation of the regional manager system, Nye succeeded to the function previously performed by Graf. It is Meinders' opinion that all Stuart-James senior management were aware of lining up the after-market in new issue to cross sell and buy orders because of the transaction volume on the first day of trading. Meinders recalls Padgett at one time saying that at some point Stuart-James would make more money in first day after market trading commissions than had been raised in the underwriting.

3. In the first day of trading in UMB Equities (Monday, March 17, 1986), Meinders was called at his home early in the morning by Mike Barber, the assistant manager of the southeast Denver office where Meinders was then working as a broker. Barber was angry. He told Meinders that Sunday, (March 16, 1986) had been a work day and that both Barber and Dirk Nye were upset because Meinders had not been available to be called to come into the office. Meinders was told that brokers had spent the previous day (Sunday) preparing for the first day of trading. He was told that he could not do business if he was not prepared. Meinders sold out all his customer positions in the first day of trading. The demand for UMB stock was strong. Brokers were being offered a commission equal to the public offering price of the security to meet the firm's need for stock. Based on the high commission being paid, the demand for the

stock and brokers being in the office the day before, it is Meinders' opinion that buy orders for the stock were lined up previous to opening of trading; it is also his opinion that for the amount of volume that was done to occur, order tickets would have had to have been prepared in advance of trading.

4. Throughout the period that Meinders was at Stuart-James it was the general practice prior to first day new issue trading to: 1) solicit customers purchasing new issue as to the price at which they would be willing to sell the new issue; and 2) solicit customers who did not hold new issue as to how much stock and the price they would be willing to pay to buy in after-market trading. This procedure was in place at the time he joined the firm. Information resulting from the solicitation was communicated to Stuart Graf prior to the regional manager system. Thereafter, this information was communicated to Dirk Nye. According to Meinders, most customers purchasing new issue knew they were not to hold for the long term but would sell back their position for an immediate profit. Until there were complaints from brokers, regional managers and branch managers would receive large allocations of new issue which would be placed with their best customers who would be willing to sell back their positions to Stuart-James. By having customers who were willing to immediately sell owning much of the new issue and having after-market purchasing lined up, many of the Stuart-James branch offices were able to do a large volume of activity of the first day of after-market trading in new issues.

5. During the period that Meinders was with

Stuart-James, it was also the general practice in after-market trading to encourage brokers to cross sell orders with buy orders. Meinders is aware of this practice both from serving in Stuart-James' management as well as when he was with the firm as a broker and not in management. When he was a broker in the southeast office, Mike Barber and Dirk Nye advised brokers to cross buy and sell orders.

6. During the time that Meinders was manager of the Colorado Springs office he was criticized by both Sutton and Nye because the office was not crossing buy and sell orders at the level that they wanted and the office was not lining up after market purchasing as they wanted. As a result of this criticism and to demonstrate that he was communicating to the brokers management's position in these matters, Meinders prepared memos which he distributed to the brokers and sent to management relating to three new issues: Immucell Corporation, International Micro Computer Software, Inc. and Celerity computing. All three memos were sent by overnight mail to Sutton and the Celerity memo was sent both to Sutton and Nye. Meinders' memos served to put company policy on paper in order to communicate the policy to the brokers in the office. Meinders was never criticized by Sutton, Nye or anyone else in management for these memos.

7. Padgett was in attendance at the broker meeting previously related in Meinders' March 23, 1990 proffer in which Graf told the brokers that there were to be no sell tickets submitted unless there were purchase tickets submitted as well.

8. Offices visited by Meinders in which a board was displayed on which was posted available stock positions are as follows: Overland Park, Kansas; Cherry Creek, Southeast, Downtown, North Creek and Colorado Springs offices in Colorado; the Phoenix and Scottsdale, Arizona branch offices; and the Seattle, Washington office. Every office that Meinders worked in during his employment with Stuart-James had such a board on display. According to Meinders, these offices as well as all offices of Stuart-James were visited by the regional managers as well as Padgett and Graf.

9. Throughout the time he was with Stuart-James, it was the general practice that when a customer wanted to sell a large position, the broker would have to look for a buyer. Brokers interpreted this to mean that the customer should hold the stock for a few days until a buyer was found. A buyer was generally found as follows: First the broker would be asked to cross within his book the stock to be sold, i.e., sell the stock to another of his customers; if unable to do this, the broker then was to look to cross within his office (in this regard the board posting available positions was used); if the office were unable to cross the position, the position would be sold into trading or if it were a very large block the regional manager, in this instance Nye, would be called in order to attempt to cross the position with another office.

Very truly yours
"S/A. Thomas Tenebaum"
A. Thomas Tenebaum
For the Firm
"S/Edmund L. Epstein"

Edmund L. Epstein
Of Counsel

ATTORNEYS FOR THOMAS MEINDERS

I have read the foregoing proffer. Said proffer is true and correct. I hereby authorize Brenman Raskin Friedlob & Tenebaum P.C. to submit said proffer on my behalf.

"S/Thomas Meinders"
Thomas Meinders

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